## WASHINGTON SAGA/NABL AT A GLANCE

Amy K. Dunbar, the Association's Director of Governmental Affairs, and former President Theodore M. Hester are the proud parents of Emily Dunbar Hester, who arrived on September 17. The happy mother is currently on maternity leave. Her columns will resume in due course.

## SEMINAR ON CONTINUING DISCLOSURE SCHEDULED

On November 10, 1994, the Securities and Exchange Commission adopted amendments to Rule 15c2-12 under the Securities Exchange Act of 1934. These amendments will result in new secondary market disclosure requirements being imposed on our issuer, underwriter and borrower clients. The Association will conduct a special one-day seminary to identify and discuss issues raised by these new requirements. The seminar will be held on Thursday, January 12, 1995, from 9:00 a.m. until 5:15 p.m., at the Hyatt Regency O'Hare in Chicago. For more information, please call Rita Carlson at (708) 920-0160.

Helen Clark Atkeson
Chair
Seminar on New SEC Disclosure Requirements

## PRESIDENT KINTZINGER'S REMARKS

*The following remarks were delivered by Andrew R. Kintzinger as he assumed the presidency of the Association on September 21, 1994.*

Thank you. I am privileged and honored to become the Association's President today. I have had the good fortune to commence my committee service to NABL under the Presidential watch of Ted Hester, and to serve on Boards under the aegises of Past Presidents Richard Chirls of New York, Ric Weber of Houston, Jane Dickey of Little Rock and Neil Arkuss of Boston. I have taken much from their leadership and counsel over the past several years. Matching their countless contributions will be an impossible feat. Having taken much, my hope is now to "give back" in the best way I know how in the year ahead.

As I embark on this Presidency, I have the good luck to have as my partners in practice Bernie Friel, the distinguished first President of the Association, and Trudy Halla, former accomplished Treasurer of the Association for three years and Board member for five. Their support and institutional memories have provided guidance on many occasions, and I thank them. Only office doors away, I hope they are patient in the year ahead.

Finally, sitting before you this evening is your Board of Directors, a group of hard-working bond practitioners committed to serving their profession. This Board has made embarking on the job of President a far easier one. These individuals are a rare find: in this time of predominant emphasis on lawyer productivity and law firm profitability, these lawyers have contributed numerous hours to Association meetings, seminars and travel to serve the interests of our members. They have my complete admiration. I thank each of them for their efforts, and I ask you to join me in doing so as well.

Standing before you today, I am reminded of the questions posed by Richard Chirls when commencing his Presidency in September of 1990: "So where does one fit in? How does one become privileged to serve as your President?" Last April, I had the pleasure to address new, budding bond lawyers at the annual Fundamentals Seminar in Montreal. The billed purpose of my remarks was to discuss recent developments from the SEC and to offer an insider's view of events of the previous several months in Washington. But the more important message I wanted to carry to these lawyers beginning careers in public finance was that the work of the Association is carried out through its volunteer members. I talked about the original purpose for creating NABL, and its overriding mission today: to educate its members in the state-of-the-art of public finance law. I emphasized how the Association, through its now more than 3,000 members, works through its committees and its Board of Directors to address issues raised by regulatory initiatives, soliciting from its members critiques and solutions and sharing this collective learning with one another and with governmental agencies. It *is* a remarkable volunteer bar association. I asked the new bond lawyers that, as they develop their public finance practices, they not confine themselves

solely to attendance at NABL seminars. I urged their active participation, emphasizing the intangible benefits of doing so: the engaging conversations through the "grapevine" of fellow practitioners and the professional acquaintances that develop over the years in our special practice field. We may all wish that we were so young and energetic as these new, embarking lawyers; nonetheless, I ask you today to answer the same call: please volunteer your active participation in working with our education programs and our committees. The rewards are many, both in developing one's practice and in serving the profession.

Another reason I am here is because of my profound respect for the special lawyer called "bond counsel." I spoke admiringly to the Fundamentals lawyers about the professional challenges they have faced so early in their careers: having just caught their breath from grasping the June 1993 final arbitrage regulations, they face new SEC interpretations and proposals that will have far-reaching impact on the issuers, underwriters, and other market participants that we counsel. Like the University professor who believes his or her class is the most stimulating course in the curriculum, I have a heightened, territorial respect, if you will, for practitioners in our field. The bond lawyer is a unique chemistry of statutory and resolution draftsperson, unqualified interpreter, a counsel fluent in the intricacies of Sections 141 to 150 who at the same time is forbidden from sticking his or her head in the sand when it comes to securities law issues. In this regard I think of my immediate predecessor and, from this podium, my anxiously awaited successor. When many of us in the municipal securities bar were focusing on "trees," the lawyer's tax lawyer, Neil Arkuss, saw the forest and masterfully led us through securities law. Many in our ranks have learned their arbitrage and rebate from Wally McBride, who also, over the past year, pursued the SEC and DTC to improve notice disclosure to beneficial owners of book-entry bonds. The vast curriculum offerings at this Workshop are themselves a testament to the intellectual rigors embraced by the bond lawyer. And in transaction after transaction, I see this work completed with professionalism, with thoughtful and ethical consideration of the public and private interests involved. I continue to marvel at the creativity, intellectual pursuits and civility of the bond lawyer. To this end, I will work tirelessly over the year ahead to ensure coverage and depth in our education programs and publications to assist each of you in mastering our changing field.

A substantive reason I find myself active in our Association is the rapidly developing area of municipal securities law. Having shared with you my admiration and respect that make today such a privilege for me, I must pause for a moment to address the recent remarks of Securities and Exchange Commissioner Rick Roberts in a reported speech delivered by him last month to the Northeast State Treasurer's Conference. Talking about NABL's recent decision to not join several other market participant groups in signing a joint comment letter critical of the SEC's recent regulatory initiatives, Roberts characterized the Association as one of the "losers in this situation," adding that "lawyers have always been viewed as a disagreeable bunch and that reputation is apparently about to be enhanced, at least within the municipal securities community." To be fair, Commissioner Roberts has been a member of our Association ranks, and I do not believe he is interested in imposing radical, wholesale changes that will wreak havoc on the municipal securities markets. Yet the press coverage of his remarks provoked one thoughtful NABL member to ask in an August 19 letter about why NABL declined to participate in the joint comment letter and, "why is Roberts compelled to make such a malignant remark?" These are important questions, because formulating the answers allows us to reconfirm and underscore our roles as bond lawyers and as an Association of bond lawyers. The answers include assessing where we have been over the past twelve months with Congress, the SEC and other market participants and how we may proceed in the twelve months ahead.

In hearings last October before Congressman Markey's Telecommunications and Finance Subcommittee of the House Energy and Commerce Committee, SEC Chairman Levitt called upon market participants to address allegedly inappropriate political contributions and influence peddling perceived to be undermining the integrity of the market, and called for improved disclosure through new interpretive authority and rulemaking. He subsequently sought affirmative action from bond lawyers on curbing political contributions, and he called on market participants to determine what interpretations or rules should be issued to address perceived problems in the market.

Our Association's response, under the able leadership of Neil Arkuss, was thoughtful and timely. In October of last year, the Association offered testimony before Congressman Markey's Subcommittee supporting enhanced flow of secondary market information, but we recommended strengthening and enforcing existing suitability rules rather than imposing new, mechanistic requirements that create unnecessary regulatory and cost burdens on state and local governments. In response to alleged marketplace scandals, we urged that political contributions are not inherently an investor protection issue or disclosure problem. After several months of volunteer study, committee debate and Board discussion, NABL rendered to our lawyer members a responsible statement of professional principles with respect to political contributions, which we will discuss following the conclusion of these remarks.

Over October, November, and December of last year, NABL met with eleven other municipal market participants to advance market-based solutions to the SEC's disclosure concerns. The group, including NABL, issued a joint statement in December recommending a framework for improving the availability of information in the secondary marketplace. NABL's participation in this process was critical to encouraging market groups to identify real problems, to proceed with reason in recommending actions and to ensure exemptions from potentially broad and overreaching regulation. While not every interested member found our signing the statement palatable, our nonparticipation could well have skewed proposed market solutions toward overregulation.

In each of these instances, we pursued overtures for dialogue positively and with enthusiasm. In the process, we developed working relationships with market participants who directly affect the affairs of our clients and, consequently, our practices. Because of our active participation, and the keen navigating skills of Amy Dunbar, our Association is taking on a new role among public interest groups, issuer organizations and broker-dealer associations, adding a new dimension to our market presence. It is important that our active dialogue with other market participants and with the MSRB continue in the months ahead.

Our participatory role does not lessen, but becomes more refined, in the stark light of formal comment to an SEC interpretive release construing disclosure obligations and to specific, proposed amendments to Rule 15c2-12 potentially mandating disclosure form and content and directly impacting on the day-to-day practices of the issuers, underwriters, borrowers and credit enhancers we counsel.

Our extensive comment letter on the SEC initiatives submitted to the Commission by its July 15 deadline was a first-rate example of NABL volunteerism. What stood out in my mind about this process was the *agreeability* among more than twenty diverse practitioners about needed clarifications in the interpretive release and the consensus for improving secondary market disclosure through suitability rules and interpretative guidance rather than by mechanistic, mandatory means.

Simultaneous with submission of the Association's comment letter, momentum was mounting to reassemble the coalition from the original joint group statement in order to produce a joint comment to the Commission on its Interpretive Release and proposed rule amendments. Under the able leadership of NABL member Jeff Green, wearing his GFOA hat, the group met in several dialogues to achieve a consensus document. We again participated actively, extending ourselves as neutral legal technicians advising on the potential impact of specific proposals on the diversity of market participants we represent as clients. Our ultimate decision to step aside from signing the joint comment submitted to the Commission in August was not disagreeability nor a losing of consensus effort, but rather a reconfirmation of our unique role as counsel in responding to regulatory initiatives. On balance, it was important to our members that we not risk inconsistency with, or dilution of, our detailed comment letter that tested statutory authority, questioned, rather than accepted, premises underlying the proposed regulation analysis, and offered alternate approaches and narrowly tailored fixes to current laws and regulations. There is much to agree with in the joint comment letter. At the same time we must keep our focus on what we *uniquely* do best: advising with authority about the impact of regulatory proposals on our clients. As Ric Weber commented in his Presidential remarks in September, 1991:

> First, we should restrict ourselves to the issues on which we can speak with credibility. Second, we must not hesitate to express our honest views about regulation ... sensitive to the practical as well as the ideal.

Of course, the main recipient of our "honest views" is the Commission. We should support the SEC's goal of increasing the quality and quantity of material information to the secondary market. Issuers of municipal securities should make adequate continuing disclosure. I support discussing with clients the incentives and disincentives for engaging in ongoing disclosure commitments. And I would advise clients that, while exempt from the ongoing reporting requirements of the 1934 Act, the antifraud provisions, market changes and voluntary guideline efforts suggest that issuers and related participants should, with a full understanding of incentives and disincentives, engage in developing cost-effective ongoing disclosure commitments and programs. Is a regulatory nudge to the market through interpretive guidance, adjustments to suitability rules and enhanced enforcement helpful or necessary to hasten the pace of voluntary efforts? I think so. Perhaps a tailored underwriting rule requiring disclosure of the presence or absence of continuing disclosure commitments and the material terms or consequences of this presence or absence to an investor would be an appropriate, further step. Such a rule modification might find the same relatively ready market acceptance that Rule 15c2-12 has. However, mandating specific form and content of continuing information across the board for issuers and "significant obligors" paints with too broad a brush. Indeed, we speak without self-interest in this regard. To draw on an oft-quoted portion of our Congressional testimony of last fall:

> "Let [us] put into perspective our role as lawyers in this process. It would clearly be in our best interest as an association of lawyers to come to you and say that increased primary and secondary market disclosure and registration is absolutely necessary for the marketplace. You would be enacting the Municipal Bond Lawyers' Full Employment Act should you require such information from municipal securities issuers. Assuming 5 hours of lawyer time per year per issue at $150/hour for 1.5 million issues, it would cost issuers over $1 billion yearly to comply and greatly enrich our profession. We are here today to tell you that we do not believe the increased cost to our state and local governments issuing clients is justified."

We may disagree with the Commission on the currently proposed route, but we must applaud the responsible way in which the talented and thoughtful Commission staff has proposed the initiatives. They have asked numerous, specific questions and have affirmatively sought answers from us. They have been speaking in many forums, including our seminar programs, to solicit input. They have, in these dialogues, shown recognition of the special difficulties some of the Commissions' proposals pose for the legal profession. Hardly disagreeable, Commission staff and our municipal securities lawyers are "out in front" on this dialogue. Since the late 1980's, we have taken a leadership role in the development of disclosure rules, and I pledge our continued leadership in advising on disclosure issues. In addition to honest critique, we will make every effort to advance constructive solutions to the SEC.

Last May at our Washington Seminar, SEC Chairman Levitt recognized NABL as a "valued partner" in Commission efforts to address the conduct of municipal underwriters and the disclosure of information to investors. We do need to embrace the practicality of market change. In doing so, we can borrow upon the experience of our partners in corporate securities who deal in 10-Q's, 10-K's and 8-K's on an ongoing basis. However, we must also proceed with a laser focus on the impact and burdens of Commission proposals on the local and state governmental issuers which we serve as bond counsel. As bond counsel, we must question proposed rulemaking that reaches further than continuous disclosure requirements for corporate issuers, that raises legitimate questions of statutory authority, that may well impose compliance costs in excess of demonstrable benefit, and that may lead to mechanistic continuing disclosure that confuses and stymies rather than informs the investor.

Chairman Levitt remarked, as well, that we "are clearly participants as well as counselors" in the evolution of disclosure and ethical standards in the municipal marketplace. While we may differ from the regulators in defining these roles, I believe the tension between NABL as a progressive market participant and NABL as an Association of lawyer

counselors is a healthy, vibrant one. In daily practice, our members are counseling clients on materiality, drafting continuing disclosure commitments and advising on ethical standards. We must also step forward and recognize the increased importance of our voice in the marketplace on regulatory issues. Throughout, we must adhere to our mission: volunteer education of our members and advancing through constructive dialogue our honest lawyer appraisal of regulatory initiatives.

In addition to the securities law arena, I want us to maintain equal footing on the tax law front. We are beginning to see market discussion of our recently amplified standard that bond counsel may apply when rendering the tax portion of the bond opinion; understanding that perhaps the most exacting work our members perform is the rigor of the unqualified bond opinion, we want to provide the education forums in which you can develop your analysis of this amplification. The IRS is pursuing enhancement of its audit function in the area of tax-exempt bonds, including cooperation with the SEC in enforcement measures. We, as an Association, continue to support enforcement to identify and address abusive transactions. Keeping a focus on real abuse is preferable to over-reaching, reactive regulation that impairs the many valid, non-abusive public financings in which we engage. To accomplish this, it is important that we continue our work with personnel of the IRS, Treasury and the SEC to educate on the complexity of transactions that, rightly or wrongly, come into question. The input of our members is critical in this area.

Since release of the final arbitrage regulations in June of last year, much of the Treasury and IRS focus has been on matters other than arbitrage. As Dave Walton told me a few weeks back, "there haven't been any fireworks lately, and that isn't a bad thing." But, as David Caprera, Chair of the Arbitrage and Rebate Committee, perceptively wrote to me recently:

> This is not to suggest that we should close the patent office because everything has already been invented but, rather, that these things go in cycles and we are currently at an ebb.

In the ebb, I am asking our tax committees to stay out front in serving our tax bar and the bond practitioner by monitoring glitches, interpretive questions and technical corrections to the regulations, by studying private letter and revenue rulings and by actively sharing these insights with our members. Of particular interest in the year ahead are the anticipated, although perhaps not imminent, regulations on private activity bond definitions and tests. As the 1989 Anthony Commission and commentary since have demonstrated, this definitional quagmire is a critical one to our members' practices. While I am certain that regulatory proposals will be thoughtful, I do not see easy solutions. The answers to where to draw the lines between general public use and private business use, allocations, unrelated use, payment and loan tests are imbedded in a diversity of local and state practices developed over many years. I am asking our tax committees to cast a wide net to ensure that, if regulations are proposed, a broad diversity of bond counsel practitioners will be involved in the comment process to ensure that our input is thorough. Likewise, I am asking our tax committees to monitor any developing arbitrage and tax rules for derivative products. More than just "cutting edge" products spotlighted in the media, derivative products are now being broadly encountered by bond counsel, and we want to be equipped to answer their inquiries and concerns.

While disclosure and tax developments may be full plate enough, the Board is revisiting and reassessing our role as bond counsel under the Model Rules of Professional Conduct. We hope to see through to publication in the next several months an updated *Function and Professional Responsibilities of Bond Counsel* for our members. On a related topic, SEC Chairman Levitt asked us last May to address perceived problems with the selection of lawyers and the proliferation of functions on offering statements. NABL has previously published thoughtful essays and comment on these topics, and we will revisit their contents for reconfirmation or further study. Finally, members are increasingly bringing to our attention judicial developments of interest to our practice field, and I will ask our committees to remain vigilant of judicial proceedings that merit comment on behalf of our members.

Our most important mission will continue to be providing top-notch forums for our members to exchange their learning on the substantive challenges ahead; we will continue to energize the Arbitrage Seminar, which is the tax forum of choice for our community. I believe that our public finance bar is only as strong as the talent of new blood coming into the practice and, to that end, we will work to keep our Fundamentals program